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No. 88-603

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF ARIZONA, PETITIONER

v.

CONRAD MARION FLINT

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the State of Arizona has jurisdiction, concurrent with that of the United States under 18 U.S.C. 1152, to prosecute a non-Indian for a crime committed against an Indian on the Navajo Indian Reservation in Arizona.

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. On May 14, 1986, a state grand jury in Navajo County, Arizona, returned an indictment charging respondent with six counts of sexual conduct with a minor and two counts of commercial sexual exploitation of a minor. Pet. App. A2. On June 18, 1986, a different grand jury indicted respondent on four additional counts. The indictments and grand jury testimony charged that respondent, a non-Indian school teacher employed by Navajo County to teach Indian children, took nude photographs and videotapes of male Indian children while they were engaged in various sexual acts with him and with each other. *Id.* at C2-C3. On August 7, 1986, the Superior Court, *sua sponte,* dismissed both indictments on the ground that the State lacked jurisdiction over crimes committed by non-Indians against Indians on the Navajo Reservation. *Id.* at C1-C11.

2. Although the State does not mention the point in its petition, the United States brought charges against respondent under 18 U.S.C. 1152 for engaging in sexual conduct with a minor. Section 1152 provides that, "[e]xcept as otherwise expressly provided by law, the general laws of the United States as to punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to Indian country." In charging respondent under 18 U.S.C. 1152, the United States invoked the Assimilative Crimes Act, 18 U.S.C. 13, which incorporates state substantive law as federal law for offenses committed on federal enclaves where Congress has not made the conduct punishable under a specific federal statute. The United States charged respondent, through 18 U.S.C. 13, with violating the same state statutes on which the state charges were brought. Ariz. Rev. Stat. §§ 13.604.01(a), 13.1401, 13.1405 (1978 & Supp. 1988).

Respondent pleaded guilty in federal court to one count charging sexual conduct with the child who was the victim of the acts charged in one of the state indictments. *United States* v. *Flint,* No. CR 86-286 PHX EHC (D. Ariz.). Paragraph 3 of the plea agreement stated that the United States would not prosecute respondent for any other incidents of sexual conduct with a minor occurring prior to his arrest on May 10, 1986, and that the State would not prosecute him for any charges in the state indictments. The district court told respondent that it had no jurisdiction over the State and that if the State decided to prosecute him, that action would not provide a basis for withdrawal of his plea to the *federal* charge. *United States* v. *Flint,* 10/6/86 Tr. 15-18. The court then asked respondent whether he wanted to proceed with his plea, and respondent stated that he did (*id.* at 18). Respondent was sentenced to 20 years' imprisonment on the federal conviction.

3. In the meantime, the State had appealed the Superior Court's dismissal of the state indictments. In an opinion dated January 19, 1988, the Arizona Court of Appeals affirmed the dismissal, concluding that federal jurisdiction under 18 U.S.C. 1152 is exclusive (Pet. App. A1-A21).

DISCUSSION

If the Court were writing on a clean slate, it might conclude that federal jurisdiction under Section 1152 is not exclusive and that Arizona therefore has jurisdiction over offenses committed by non-Indians against Indians in Indian country. The State has a strong interest in enforcing its criminal laws against non-Indians, and state jurisdiction would not necessarily interfere with federal or tribal interests.

The Court, however, is not writing on a clean slate. The statutory provision now codified in 18 U.S.C. 1152 was enacted at a time when States had no jurisdiction over Indian reservations within their borders. The shared assumption of the three Branches after that time was that federal jurisdiction under 18 U.S.C. 1152 is exclusive and that the States do not have jurisdiction over offenses by non-Indians against Indians. This Court has so stated on several occasions and the Executive and Legislative Branches have acted on that assumption several times, in supporting and enacting legislation concerning state jurisdiction on Indian reservations. Consistent with this understanding, the highest courts of Montana, North Dakota, and Oklahoma, like the Arizona Court of Appeals in this case, have held that the States are without jurisdiction over offenses committed by non-Indians against Indians in Indian country. Other state courts have expressed a similar view. In light of this background, and in light of the fact that respondent has already been prosecuted in federal court on related charges, we submit that there is no compelling reason for the Court to grant review in this case.

1. The second paragraph of 18 U.S.C. 1152 explicitly excepts from its coverage offenses committed by one Indian against the person or property of another Indian. Those offenses are left exclusively to tribal jurisdiction, except for "major crimes" by Indians that are subject to federal jurisdiction under 18 U.S.C. 1153. In addition, in *United States* v. *McBratney*, 104 U.S. 621 (1882), this Court held that crimes by non-Indians against other non-Indians were implicitly excluded from Rev. Stat. § 2145 (1878 ed.), the predecessor to 18 U.S.C.

1152. The Court acknowledged that Rev. Stat. § 2145 applied to such crimes prior to statehood (104 U.S. at 623; see also *New York ex rel. Ray* v. *Martin,* 326 U.S. 496, 500 & n.5 (1946)), but it held that the Act admitting Colorado to the Union implicitly repealed Rev. Stat. § 2145 insofar as it applied to offenses by non-Indians against non-Indians and vested such jurisdiction in the State (104 U.S. at 623-624). The Court stressed, however, that *McBratney* presented no question "as to the punishment of crimes committed by or against Indians" (*id.* at 624). Accord *Draper* v. *United States,* 164 U.S. 240 (1896); *New York ex rel. Ray* v. *Martin, supra.* See also *United States* v. *Wheeler,* 435 U.S. 313, 325 n.21 (1978); *United States* v. *Antelope,* 430 U.S. 641, 643 n.2 (1977).

As a result of these exceptions, Section 1152 is confined to "interracial" crimes—*i.e.,* crimes committed either by or against Indians. In *Donnelly* v. *United States,* 243 U.S. 259 (1913), the Court rejected an attempt to narrow the scope of Section 1152 still further to exclude crimes *against* Indians by non-Indians. The defendant argued that under the rationale of *McBratney,* California's admission to the Union conferred on the State the "undivided authority to punish crimes committed upon * * * an Indian reservation, excepting crimes committed by the Indians." 228 U.S. at 271. The Court concluded, however, that "offenses committed by or against Indians are not within the principle of * * * *McBratney.*" *Ibid.* The Court observed that "[t]his was in effect held as to crimes committed *by* the Indians" in *United States* v. *Kagama,* 118 U.S. 375, 383-384 (1886), which sustained federal jurisdiction under the Major Crimes Act over crimes by Indians in Indian country on the ground that the Indians are wards of the Nation and in need of its protection. 228 U.S. at 271 (emphasis added). The Court concluded that "[t]his same reason applies—perhaps *a fortiori*—with respect to crimes committed by white men against the persons or property of the Indian tribes while occupying reservations set apart for the very purpose of segregating them from the whites and others not of

Indian blood." *Id.* at 272.[1]

Under *Donnelly*, the United States had jurisdiction under Section 1152 to prosecute respondent for the conduct at issue here. The question, then, is whether Arizona has concurrent jurisdiction to prosecute him as well. As the court of appeals observed (Pet. App. A10-A12), it is settled that federal jurisdiction under 18 U.S.C. 1152 (or 1153) over crimes committed *by* Indians is exclusive. *United States* v. *John*, 437 U.S. 634, 651 (1978); *Seymour* v. *Superintendent*, 368 U.S. 351, 359 (1962); *Williams* v. *Lee*, 358 U.S. 217, 220 n.5 (1959); *Arquette* v. *Schneckloth*, 56 Wash. 2d 178, 351 P.2d 921 (1960); *Application of Denetclaw*, 83 Ariz. 299, 320 P.2d 697 (1958); *State* v. *Campbell*, 53 Minn. 354, 55 N.W. 553 (1893). This rule protects the Indians from the possibility of prejudice in state courts, and thus is an expression of the federal duty to protect the Indians. Arizona argues that in the converse situation, involving crimes committed *against* Indians, there should be a different rule, permitting the State to exercise concurrent jurisdiction. Although there is much to commend such a rule as a matter of policy, it encounters substantial obstacles.

2. a. In deciding whether state law may be applied to the on-reservation conduct of non-Indians in matters affecting Indians, this Court, in the absence of a governing Act of Congress, undertakes a " 'particularized examination of the relevant state, federal, and tribal interests.' " *Cotton Petroleum Corp.* v. *New Mexico*, 109 S. Ct. 1698, 1707 (1989), quoting *Ramah Navajo School Bd.* v. *Bureau of Revenue*, 458 U.S. 832, 838 (1982). The Court "examine[s] the language of the relevant treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 144-145 (1980); see also *Cotton Petroleum*, 109 S. Ct. at 1707;

[1] Federal convictions of non-Indians for crimes against Indians in Indian country were subsequently sustained in *United States* v. *Pelican*, 232 U.S. 442 (1914); *United States* v. *Ramsey*, 271 U.S. 467 (1926); *United States* v. *Chavez*, 290 U.S. 357 (1933); and *Williams* v. *United States*, 327 U.S. 711 (1946).

Three Affiliated Tribes of the Fort Berthold Reservation v. *Wold Engineering, P.C.*, 476 U.S. 877, 884 (1986) (*Three Affiliated Tribes II*). If the Court were to weigh the respective tribal, federal, and state interests in that general manner here, a strong argument could be made for permitting the State to exercise jurisdiction.

In *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court held that Indian tribes do not have criminal jurisdiction over non-Indians. State jurisdiction over offenses committed by non-Indians against Indians therefore would not interfere with any tribal jurisdiction over the same subject matter. Indeed, this Court observed in *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Engineering, P.C.*, 467 U.S. 138, 149 (1984) (*Three Affiliated Tribes I*), that "[t]he exercise of state jurisdiction is particularly compatible with tribal autonomy when * * * the tribal court lack[s] jurisdiction over the claim at the time the suit [is] instituted." Nor would state jurisdiction appear to have a significant impact on tribal autonomy and self-government as to those subjects over which the Tribe does have jurisdiction—principally its own members and territory.

The United States of course has a duty under 18 U.S.C. 1152, as well as Article I of the Treaty of June 1, 1868, between the United States and the Navajo Tribe (15 Stat. 667), to protect the Indians on the Reservation against crimes committed by non-Indians. But recognition of concurrent state jurisdiction would not be incompatible with that duty. In fact, it may well be that concurrent state jurisdiction would facilitate effective law enforcement on the Reservation, and thereby further the federal and tribal interests in protecting Indians and their property against the actions of non-Indians.[2] Federal investigative

[2] In other contexts, the Court has indicated that a State may enforce its own laws intended for the protection of the Indians, effectively supplementing federal efforts. See *Rice* v. *Rehner*, 463 U.S. 713, 723 & nn.9, 10 (1983) (prohibitions against introducing liquor into Indian country); *New York* v. *Dibble*, 62 U.S. (21 How.) 366 (1859) (exercise by state courts of equitable jurisdiction barring non-Indians from entering Indian lands).

agents, prosecutors, and courts often are much farther from the scene of an on-reservation crime than are their state and local counterparts. This distance also imposes a burden on victims and witnesses. In part for these reasons, the Civil Rights Commission has questioned the adequacy of the federal response to reservation crimes committed by non-Indians against Indians. U.S. Comm'n on Civil Rights, *Indian Tribes: A Continuing Quest for Survival* 175-176 (1981).

To the extent that the rationale for exclusive federal jurisdiction under 18 U.S.C. 1152 and 1153 over crimes committed *by* Indians is the potential for prejudice against Indians in the state courts and law enforcement agencies, a similar prejudice might operate against Indian victims, and thereby in favor of non-Indian defendants accused of committing offenses against them. But if state authorities declined to prosecute a non-Indian for a crime against an Indian for that (or any other) reason—or if the non-Indian defendant was acquitted in state court—the United States would be free to bring charges based on the same conduct to vindicate the distinct federal interest in protecting the Indians. *Abbate* v. *United States,* 359 U.S. 187 (1959).

Finally, the State has a legitimate interest in enforcing its criminal laws against non-Indians, even on an Indian reservation—at least where there is no interference with federal and tribal interests. Moreover, where jurisdiction is properly assumed, a State has a legitimate interest in furnishing protection to its Indian citizens, just as it furnishes them with other benefits, such as access to state courts in civil cases. See *Three Affiliated Tribes I; Three Affiliated Tribes II.*

b. Largely for the foregoing reasons, the Office of Legal Counsel concluded in a 1979 opinion that, although the question was "exceedingly difficult," a "substantial case" could be made that the States should not be deprived of jurisdiction over offenses committed by non-Indians against Indians. 3 Op. Off. Legal Counsel 111, 117, 120 (1979).[3] Based on OLC's analysis, an insertion was included in the United States Attorneys' Man-

[3] The OLC opinion principally concerned jurisdiction over "victimless" crimes.

ual in 1980, which concluded that although the question was "difficult," the States do have concurrent jurisdiction over such offenses. *United States Attorneys' Manual* § 9-20.215 (1985).[4]

3. We have now reexamined the jurisdictional issue in response to the Court's invitation in this case. Especially in light of considerations that were not addressed in the OLC opinion or the United States Attorneys' Manual, we are of the view that the argument in favor of state jurisdiction is more difficult than it appeared to this Department in 1979 and 1980. In particular, we believe that Arizona's submission in this case places too much emphasis on general principles of preemption that apply in the absence of a governing Act of Congress. The fact is that Congress has passed two statutes that specifically address the subject of jurisdiction over offenses committed by non-Indians against Indians in Indian country: 18 U.S.C. 1152 and Public Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, codified as amended at 18 U.S.C. 1162, 25 U.S.C. 1321-1326, and 28 U.S.C. 1360). The relevant question is whether those statutes, not general principles of preemption standing alone, permit Arizona to exercise jurisdiction over such offenses. See *Kennerly* v. *District Court,* 400 U.S. 423, 424 n.1, 427 (1971). As we explain below, the text, background, and interpretation of both statutes indicate that they do not.

a. This Court has stated on three occasions, albeit in dicta, that in the absence of authorization by Congress, the States do not have jurisdiction over offenses committed by non-Indians against Indians in Indian country. In the first of those cases, *Williams* v. *United States,* 327 U.S. 711 (1946), a non-Indian man was charged with having sexual intercourse with an underage Indian girl on an Indian reservation. Although no jurisdictional claim was raised, the Court, in describing the statutory regime governing the reservation, stated: "While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on [the] reservation between persons

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[4] By contrast, the Solicitor of the Interior concluded in 1978 that, even after *Oliphant,* federal jurisdiction over offenses by non-Indians against Indians remains exclusive. 5 Indian L. Rep. H-10 (1978).

who are not Indians, the laws and courts of the United States, *rather than those of Arizona,* have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian" (*id.* at 714 (emphasis added)).

In *Williams* v. *Lee, supra,* the Court held that an Arizona court did not have jurisdiction over a civil suit brought by a non-Indian against an Indian arising out of a transaction occurring on the Navajo Reservation, because the exercise of state jurisdiction would undermine the authority of the tribal courts. After discussing jurisdictional principles governing Indian reservations generally (358 U.S. at 218-221) and observing that "state courts have been allowed to try non-Indians who committed crimes against each other on a reservation," the Court stated that "if the crime was by or *against an Indian,* tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive" (*id.* at 220 (emphasis added)). As a result, the Court noted, "non-Indians committing crimes against Indians are now generally tried in federal courts" (*id.* at 220 n.5).

The Court made a similar comment in *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation,* 439 U.S. 463 (1979), in which it upheld the manner in which Washington assumed jurisdiction over Indians and Indian territory pursuant to Public Law 280. The Court observed that before the State assumed jurisdiction, its law reached into Indian reservations only if it did not infringe on tribal self-government. "As a practical matter," the Court explained, "this * * * meant that criminal offenses by or *against Indians* [had] been subject only to federal or tribal laws * * * except where Congress * * * 'expressly provided that State laws shall apply.' " 439 U.S. at 470-471 (emphasis added), quoting *McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164, 170-171 (1973).[5] See also 439

[5] The Court could have suggested in *Yakima Nation* that state jurisdiction over crimes by non-Indians against Indians would not interfere with the right of the Indians to make their own laws and be governed by them, since *Oliphant* had held only ten months earlier that a Tribe cannot exercise criminal jurisdiction over non-Indians. Nevertheless, in *Oliphant* itself, the Court appeared to regard federal jurisdiction over crimes committed by non-Indians

U.S. at 498-499 (by virtue of Washington's partial assumption, "[s]tate jurisdiction is complete as to all non-Indians on reservations").

The statements in these three decisions were dicta, but they cannot be dismissed as mere casual asides. In *Williams* v. *United States* and *Williams* v. *Lee,* they were the product of a thorough and considered review of jurisdictional principles in Indian country. See 327 U.S. at 714-715 n.10; 358 U.S. at 219-222. And in *Yakima Nation,* the Court's observation set the stage for a discussion of Public Law 280, which authorized the States to *assume* jurisdiction over offenses "by or against Indians" in Indian country—an enactment that alone suggests that the States do not have such jurisdiction in the absence of express authorization by Congress. See pages 13-17, *infra.*

b. The view expressed by this Court in the two *Williams* cases and *Yakima Nation* finds some support in the origins and history of Section 1152. Section 1152 was enacted as Section 25 of the Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 733. See *New York ex rel. Ray* v. *Martin,* 326 U.S. at 500 n.6. At that time, this Court's then-recent decision in *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832), "reflected the view that Indian Tribes were wholly distinct nations within whose boundaries 'the laws of [a State] can have no force.' " *New Mexico* v. *Mescalero Apache Tribe,* 462 U.S. 324, 331 (1983), quoting 31 U.S. (6 Pet.) at 561. As a result, the Congress that enacted what is now 18 U.S.C. 1152 no doubt assumed that it occupied the entire field of criminal law enforcement in Indian country (ex-

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as exclusive. Thus, after discussing certain Acts of Congress, including the second paragraph of 18 U.S.C. 1152 (see 435 U.S. at 203), the Court stated (435 U.S. at 204-205, quoting *In re Mayfield,* 141 U.S. 107, 116 (1891)):

> The "general object" of the congressional statutes was to allow Indian nations criminal "jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side."
>
> * * * Indian tribal courts are without inherent jurisdiction to try non-Indians, and must depend on the Federal Government for protection from intruders.

cept for that undertaken by the Tribes), and that the States therefore did not have concurrent jurisdiction over reservations within their borders.

That inference is reinforced by Congress's decision to apply to Indian country the laws of the United States that apply to crimes committed within the "sole and exclusive jurisdiction of the United States" (4 Stat. 733). The quoted phrase suggests that Congress contemplated a parallel between Indian country and the federal enclaves over which Congress may "exercise exclusive Legislation" (U.S. Const. Art. I, § 8, Cl. 17). Because state criminal laws were inapplicable in such enclaves, the text of Section 1152 suggests that Congress intended those laws to be inapplicable in Indian country as well.[6]

Although this Court subsequently held in *McBratney* that a State has jurisdiction over crimes committed by non-Indians against non-Indians, *McBratney* does not support Arizona's argument here. The basis of the holding in *McBratney* was not that 18 U.S.C. 1152 remained applicable and that the State had concurrent jurisdiction over those crimes, as Arizona argues. Rather, the Court held that the Act admitting Colorado to the Union implicitly *repealed* 18 U.S.C. 1152 as applied to crimes involving only non-Indians, and that the State acquired jurisdiction as a result of that repeal. 104 U.S. at 623-624. That reasoning suggests that where, as here, Section 1152 has *not* been repealed, federal jurisdiction remains exclusive.

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[6] Only after *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 147-149 (1937), was it evident that a state legislature's consent to the purchase of property by the United States could be conditioned on the State's retention of concurrent jurisdiction. In response to *Dravo*, Congress in 1940 amended the definition of the special territorial and maritime jurisdiction of the United States, now codified in 18 U.S.C. 7(3), to refer to "lands reserved or acquired for the use of the United States, and under the exclusive *or concurrent* jurisdiction thereof" (emphasis added). Act of June 11, 1940, ch. 323, 54 Stat. 304; see H.R. Rep. No. 1623, 76th Cong., 3d Sess. (1940); S. Rep. No. 1708, 76th Cong., 3d Sess. (1940). Since *Dravo*, concurrent state and federal jurisdiction over a particular tract has been a matter for negotiation between the two sovereigns. See 40 U.S.C. 255. Public Law 280 instituted a similar regime by which jurisdiction over crimes "by or against Indians" is subject to adjustment among the United States, the States, and the Tribes. See page 18, *infra*.

This reading of *McBratney* also is more consistent with principles that historically have governed jurisdiction in Indian country. The Framers of the Constitution intended that relations between Indians and non-Indians would be regulated by the United States, to the exclusion of the States, and Congress has consistently acted on that premise. *County of Oneida* v. *Oneida Indian Nation,* 470 U.S. 226, 234-235 & n.4 (1985). Congress reasonably could conclude that because offenses committed by non-Indians against other non-Indians in Indian country do not directly involve relations with the Indians, jurisdiction could be transferred to the States without undermining this principle of exclusive federal control. By contrast, criminal offenses "by or against Indians" directly implicate relations between Indians and non-Indians, which traditionally have been the subject of federal, not state, concern.

Finally, contrary to Arizona's contention (Pet. 21-23), this Court in *Williams* v. *United States* reasonably relied on *Donnelly* for the proposition that Arizona did not have jurisdiction over offenses committed by non-Indians against Indians on an Indian reservation. The Court in *Donnelly* rejected the contention that, under the *McBratney* rationale, the admission of California to the Union gave the States undivided authority to punish crimes, except those committed by Indians. The Court described *McBratney* as holding, in effect, that the "admission of States qualified the former Federal jurisdiction over Indian country included therein by withdrawing from the United States *and* conferring upon the State the control of offenses committed by white people against whites, in the absence of some law or treaty to the contrary" (228 U.S. at 271 (emphasis added)). The Court held, however, that crimes committed "by or against Indians" are "not within the principle of * * * *McBratney*" (*ibid.*). The Court thus viewed the *McBratney* "principle" as having two aspects—the repeal of federal jurisdiction under what is now 18 U.S.C. 1152 and the concomitant vesting of jurisdiction in the State—and evidently believed that both aspects were inapplicable in *Donnelly*. This reading of *Donnelly* is reinforced by the fact that the Executive Branch

took the position in *Donnelly* that California did not have jurisdiction over the offense. According to the official report of the oral argument, counsel for the United States contended that although *McBratney* left open the question of jurisdiction over crimes "by or against Indians," such crimes, "being a part of the intercourse between the two races, are fundamentally within the scope of regulation by Congress *rather than by the States*" (228 U.S. at 249 (emphasis added)). The same view was expressed in the government's brief in *Donnelly*.[7] Cf. *United States* v. *Ramsey*, 271 U.S. 467, 469 (1926); *United States* v. *Chavez*, 290 U.S. 357 (1933).

4. The text and background of Public Law 280 lend some support to the conclusion that the States are without jurisdiction over offenses committed by non-Indians against Indians in the absence of affirmative authorization by Congress.

a. Section 2 of Public Law 280 (67 Stat. 588-589) enacted 18 U.S.C. 1162, which is entitled "State jurisdiction over offenses committed by or *against Indians* in Indian country" (emphasis added). Subsection (a) of Section 1162 now provides that the listed States (which do not include Arizona)[8] "shall have jurisdiction over offenses committed by or *against Indians* in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of

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[7] See U.S. Br. at 14-15: "The same hostility of the local whites, which * * * was noticed in the *Kagama* and other cases cited, opposes an implication that the creation of State governments has implied a repeal of the Federal laws as affecting crimes by whites against Indians, or *vice versa*, and a delegation to the local State governments of the control of these particular interrelations between their citizens and the whites." See also U.S. Br. at 6-7. The United States similarly took the position in *Antelope* (see U.S. Br. at 9, 15, 17, 19-20, 26, 29 n.13, 30 n.14, 31, 41, 42-45) and *Yakima Nation* (see U.S. Br. at 4, 18 & App. B, Chart 2, Cases 11-20) that federal jurisdiction over crimes by non-Indians against Indians is exclusive.

[8] The States listed in 18 U.S.C. 1162(a) as originally enacted were California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin (except the Menominee Reservation). Subsequent amendments have added Alaska (with one exception) and deleted the exception for the Menominee Reservation.

such State shall have the same force and effect within such Indian country as they have elsewhere within such State" (emphasis added).[9] The clear import of the title and text of Section 1162(a) is that it comprehensively regulates the subject identified in its title (compare *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 109 S. Ct. 683, 687-688 (1989)) and constitutes the only general authorization for the States to exercise criminal jurisdiction over offenses committed "by or against Indians" in Indian country. *Three Affiliated Tribes II*, 476 U.S. at 884. Indeed, if the States already had jurisdiction over crimes by non-Indians against Indians, as Arizona argues, the reference in Section 1162(a) to offenses "against Indians" would have been superfluous: that phrase was not necessary to confer jurisdiction over offenses committed against Indians by other Indians, because such jurisdiction was conferred by the reference to offenses committed "by * * * Indians."

The conclusion that the States listed in Section 1162(a) did not already have jurisdiction over offenses by non-Indians "against Indians" is reinforced by the title of Public Law 280 as a whole: an Act "To *confer* jurisdiction on the States * * * with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes." 67 Stat. 588 (emphasis added). This inference is further reinforced by Section 6 of Public Law 280, which authorized non-listed States, such as Arizona, to amend their constitutions or statutes to remove any legal impediments to the "assumption" of jurisdiction; and by Section 7, which granted the consent of the United States to any State "not having jurisdiction" to "assume" jurisdiction by legislative action. 67 Stat. 590. Cf. *Three Affiliated Tribes I*, 467 U.S. at 150-151. As the court below observed (Pet. App. A18-A19), Arizona did not assume jurisdiction over the Navajo Reservation under Public Law 280, and it cannot do so now without the consent of the Tribe. 25 U.S.C. 1321(a). The text of Public Law 280 therefore

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[9] Subsection (c) of 18 U.S.C. 1162 provides that 18 U.S.C. 1152 and 1153 "shall not be applicable" within the areas of Indian country listed in subsection (a).

indicates that Arizona does not have jurisdiction over offenses committed "against Indians" by non-Indians on that Reservation.

b. The events preceding the enactment of Public Law 280 confirm this interpretation of the statutory text. The immediate legislative history of Public Law 280 is limited (see *Yakima Nation*, 439 U.S. at 488-493 & n.38) and focuses primarily on state jurisdiction over the Indians themselves.[10] However, Public Law 280 was the culmination of more than a decade of consideration of extending state jurisdiction onto Indian reservations, including the enactment of several measures that did so in particular States. The relevant materials reveal a consistent view on the part of Congress and the Executive Branch during this period that, in the absence of express authorization, the States did not have jurisdiction over offenses "by or against Indians."

For example, in 1948 the House passed a bill,[11] which was also reported to the Senate, that served as a model for Public Law 280. The committee reports on that bill both stated that "under the present law the States have no jurisdiction to enforce laws designed to protect the Indians from crimes perpetrated by or against Indians." S. Rep. No. 1142, 80th Cong., 2d Sess. 2 (1948); H.R. Rep. No. 1506, 80th Cong., 2d Sess. 1 (1948). The same view was expressed in the legislative history of the 1948 Acts that conferred criminal jurisdiction on New York and Iowa over crimes "by or against Indians" on reservations.[12] Similarly,

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[10] See generally H.R. Rep. No. 848, 83d Cong., 1st Sess. (1953); S. Rep. No. 699, 83d Cong., 1st Sess. (1953); *Hearings on H.R. 1063 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. (June 29, 1953) (unpublished); *Hearings on H.R. 1063 Before the House Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. (July 15, 1953) (unpublished); *State Legal Jurisdiction in Indian Country: Hearings on H.R. 459, H.R. 3235 and H.R. 3624 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 82d Cong., 2d Sess. (1952).

[11] H.R. 4725, 80th Cong., 1st Sess. (1947); see 94 Cong. Rec. 2854-2855 (1948).

[12] For New York (Act of July 2, 1948, ch. 809, 62 Stat. 1224, 25 U.S.C. 232), see H.R. Rep. No. 2355, 80th Cong., 2d Sess. 1 (1948); see also *id.* at 4

the committee reports on the 1940 Act in which Congress conferred concurrent jurisdiction on the State of Kansas over crimes "by or against Indians" (Act of June 8, 1940, ch. 276, 54 Stat. 249, 18 U.S.C. 3243) reproduce a letter from the Acting Secretary of the Interior, which states that "the authority of the several States over wrongful or illicit acts committed upon tribal or restricted Indian lands extends in the main only to situations where both the offender and the victim are white men." H.R. Rep. No. 1523, 76th Cong., 3d Sess. 2 (1940); H.R. Rep. No. 1999, 76th Cong., 3d Sess. 2 (1940).[13] Finally, Felix Cohen's *Handbook of Federal Indian Law,* which was published by the Department of the Interior in 1942, stated (at 120) that "[w]ith respect to all offenses committed by whites against Indians on an Indian reservation, state jurisdiction yields to federal jurisdiction, although in fact the Federal Government has adopted state laws in providing for the punishment of such offenses by the federal courts."[14] See also *id.* at 146.

c. This view of the limited reach of state jurisdiction is also reflected in the legislative history of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73, in which Congress repealed Section 7 of Public Law 280 and provided instead that States "not having jurisdiction" over offenses committed "by or against Indians" may "assume" such jurisdiction only with the

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(letter from Oscar L. Chapman, Under Secretary of the Interior, to Chairman Butler of the Senate Committee on Interior and Insular Affairs) ("The State already has jurisdiction over offenses committed on Indian reservations in cases not involving Indians or Indian property."); see also S. Rep. No. 1489, 80th Cong., 2d Sess. (1948). For Iowa (Act of June 30, 1948, ch. 759, 62 Stat. 1161), see H.R. Rep. No. 2356, 80th Cong., 2d Sess. 1 (1948).

[13] See also H.R. Rep. No. 2161, 82d Cong., 2d Sess. 4 (1952) (letter from Acting Assistant Secretary of the Interior White to Chairman Murdock of the House Committee on Interior and Insular Affairs concerning a bill to confer jurisdiction on California) ("Except for the Agua Caliente Reservation, the United States district court is the only tribunal that has jurisdiction over offenses committed on Indian reservations by or against Indians.").

[14] The *Handbook* stated in a footnote (at 120 n.53, citing the injunctive action in *New York* v. *Dibble* (see note 2, *supra*)), that "[t]here may be situations * * * in which a concurrent jurisdiction may be exercised by the state to protect Indians against non-Indians."

consent of the Tribe concerned. §§ 401(a), 403(b), 82 Stat. 78, 79, 25 U.S.C. 1321(a), 1323(b). In a letter to the Chairman of the House Committee addressing the tribal consent provision, Deputy Attorney General Christopher stated that "[i]n general, States at the present time do not have jurisdiction over criminal offenses committed on Indian reservations by or against Indians," and that Public Law 280 creates an exception to that general rule. *Rights of Members of Indian Tribes: Hearing on H.R. 15419 and Related Bills Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 27 (1968).[15]

5. It is not without significance that Congress's enactment of the statutory provisions just discussed alternated with this Court's pronouncements that the States are without jurisdiction over offenses "by or against Indians" in the absence of express congressional authorization. Thus: (1) Congress enacted the 1940 Act conferring jurisdiction on Kansas on the understanding that the State was otherwise without jurisdiction over such offenses; (2) this Court expressed the same view in *Williams* v. *United States* in 1946; (3) Congress then acted on that premise when it passed the special statutes for New York and Iowa in 1948 and Public Law 280 in 1953; (4) this Court reiterated the rule of *Williams* v. *United States* in *Williams* v. *Lee* in 1959; (5) Congress amended Public Law 280 in 1968, after receiving a submission from the Deputy Attorney General stating that the States are without jurisdiction over crimes committed by or against Indians in Indian country; and (6) this Court again reiterated that view in *Yakima Nation* in 1979.

Whatever once might have been the merits of Arizona's argument for concurrent jurisdiction—and, as explained above, the origins of Section 1152 and the rationale of *McBratney* and

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[15] The legislative history of the 1976 amendments to the Major Crimes Act, 18 U.S.C. 1153 (see Indian Crimes Act of 1976, Pub. L. No. 94-297, § 2, 90 Stat. 585), which were designed to eliminate discrimination between Indians charged under that Act and non-Indians charged under 18 U.S.C. 1152, also indicates that Congress believed federal jurisdiction under Section 1152 was exclusive. See H.R. Rep. No. 1038, 94th Cong., 2d Sess. 2 (1976); 122 Cong. Rec. 14,290 (1976) (remarks of Rep. Hungate).

Donnelly cast doubt on that position as an original matter—the pattern of this Court's pronouncements and Congress's actions since 1940 suggest that the Court need not revisit this jurisdictional issue unless there are substantial reasons for doing so. We do not believe those reasons are present in this case.

First, Public Law 280 and the 1968 amendments thereto establish a comprehensive regime under which Arizona may assume jurisdiction over offenses committed against Indians, albeit with the Tribes' consent. Because Congress chose to condition the assumption of jurisdiction on the basis of positive action by the State (see *Yakima Nation*, 439 U.S. at 485-495) and a formal decision by the Tribe to bring Indians under state protection, the Court may properly hesitate before accomplishing the same result by a judicial construction that departs from prior understandings.

Second, the conclusion by the Arizona Court of Appeals in this case is consistent with the holdings of the courts of North Dakota, Montana, and Oklahoma that those States are without jurisdiction over offenses committed by non-Indians against Indians in Indian country. See *State* v. *Burnett*, 671 P.2d 1165 (Okla. Crim. App. 1983); *State* v. *Greenwalt*, 204 Mont. 196, 663 P.2d 1178 (1983); *State* v. *Kuntz*, 66 N.W.2d 531 (N.D. 1954); see also *State* v. *Youpee*, 103 Mont. 86, 94, 61 P.2d 832, 835 (1936) (dictum). The Supreme Courts of New Mexico and Minnesota have expressed the same view in dicta. See *State* v. *Warner*, 71 N.M. 418, 421-422, 379 P.2d 66, 68-69 (1963); *State* v. *Jackson*, 218 Minn. 429, 431, 16 N.W.2d 752, 754 (1944); see also 30 Op. Ore. Att'y Gen. 11 (1960). The view this Court adopted in the two *Williams* cases and *Yakima Nation* thus has been widely accepted in the States.[16]

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[16] That acceptance, we hasten to add, has not been universal. In *State* v. *McAlhaney*, 220 N.C. 387, 17 S.E.2d 352 (1941), the Supreme Court of North Carolina held that the State had jurisdiction over an offense by a non-Indian against an Indian on the Eastern Cherokee Reservation. However, *McAlhaney* was decided before this Court's decision in *Williams* v. *United States* and the enactment of Public Law 280. Moreover, the decision in *McAlhaney* appears to have been largely influenced by the North Carolina Supreme Court's view of the distinct history of the Eastern Cherokee Indians, including its belief that the State had jurisdiction over the Indians themselves. See *Jackson County* v.

Third, respondent has pleaded guilty in federal court to the offense of sexual conduct with a minor based on an incident involving one of the children involved in the state charges, and he was sentenced by the federal court to 20 years' imprisonment. Because respondent was prosecuted under the Assimilative Crimes Act based on a violation of Arizona law, the State's interest in assuring that its criminal laws are enforced against its non-Indian citizens has been vindicated in this case. Moreover, the instant prosecution is inconsistent with the recitation in the respondent's federal plea agreement, in which it was represented that the State would not prosecute him on the charges then pending against him. This is therefore not a case in which the public interest in the full and fair enforcement of the criminal laws has been frustrated by the absence of concurrent state jurisdiction over respondent's crimes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Swayney, 319 N.C. 52, 57-58, 352 S.E.2d 413, 416-417, cert. denied, 484 U.S. 826 (1987); *Wildcatt* v. *Smith*, 69 N.C. App. 1, 10-11 n.16, 316 S.E.2d 870, 877 n.16 (1984). For these reasons, we are not persuaded that the nearly 50-year-old decision in *McAlhaney* gives rise to a live conflict warranting review by this Court.

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